

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

**FILED BY CLERK**

**MAY 14 2009**

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

EDWARD ABRAN MOLINA,

Appellant.

)  
)  
) 2 CA-CR 2008-0222

) DEPARTMENT B

) MEMORANDUM DECISION

) Not for Publication

) Rule 111, Rules of  
) the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20061795

Honorable Gus Aragón, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General  
By Kent E. Cattani and Amy M. Thorson

Tucson  
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender  
By Rose Weston and David J. Euchner

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B R A M M E R, Judge.

¶1 Appellant Edward Molina appeals his convictions on two counts of aggravated assault with a deadly weapon. He contends the indictment was duplicitous and multiplicitous. We affirm.

### **Factual and Procedural Background**

¶2 On appeal, we view the facts in the light most favorable to sustaining Molina's convictions, *see State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008), but relate only those facts relevant to our disposition of his appeal. In May 2006, after an altercation with F., Molina approached C. and F. while they were sitting in C.'s car. F. was sitting on the passenger side, and C. was in the driver's seat. Molina pounded on the closed, passenger's-side window with the handle of a knife and then swung the knife through the open, driver's-side window at C.

¶3 Molina was charged with two counts of aggravated assault with a deadly weapon. The first count charged him with the aggravated assault of C. "and/or" F., and the second count charged him with aggravated assault of C. Count one of the indictment, however, was amended on the first day of trial to allege that Molina had assaulted only F., instead of F. "and/or" C. After a four-day trial, the jury found Molina guilty of both counts. The trial court sentenced him to concurrent, mitigated, ten-year prison terms for each aggravated assault. This appeal followed.

## Discussion

¶4 Molina argues the initial indictment was duplicitous because count one alleged Molina had assaulted F. “and/or” C. and was multiplicitous because both counts one and two charged him with assaulting C. An indictment is duplicitous if it charges more than one offense in a single count. *See State v. Via*, 146 Ariz. 108, 116, 704 P.2d 238, 246 (1985); *see also* Ariz. R. Crim. P. 13.3(a). A duplicitous indictment is improper because it does not provide adequate notice of the charges, creates a risk of nonunanimous jury verdicts, and makes the precise pleading of double jeopardy impossible. *See State v. Brown*, 217 Ariz. 617, ¶ 15, 177 P.3d 878, 883 (App. 2008). A multiplicitous indictment charges a single offense in more than one count, *see Via*, 146 Ariz. at 116, 704 P.2d at 246, and improperly creates a risk of multiple punishment, violating double jeopardy principles. *See Brown*, 217 Ariz. 617, ¶ 7, 177 P.3d at 881.

¶5 A defendant must challenge a defect in a charging document by motion filed before trial. *See* Ariz. R. Crim. P. 13.5(e) and 16.1(c). Molina did not do so and, therefore, has presumptively forfeited these issues on appeal. Typically, when a defendant does not raise an issue in the trial court, we will reverse only if the error is fundamental and the defendant demonstrates the error prejudiced him or her. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). And Molina acknowledges our supreme court has suggested that defects in a charging document are not subject to appellate review if a defendant failed to raise a timely objection below. *See State v. Anderson*, 210 Ariz. 327,

¶ 17, 111 P.3d 369, 378 (2005); *see also State v. Urquidez*, 213 Ariz. 50, ¶ 4, 138 P.2d 1177, 1178 (App. 2006).

¶ 6 Even assuming, *arguendo*, that fundamental error review is appropriate in these circumstances, Molina is not entitled to relief. Even if we assume, without deciding, that the initial indictment was defective, on the first day of trial the court granted the state’s motion to amend the indictment to allege separate counts of aggravated assault of C. and F. The court instructed the jury, in both the preliminary and final jury instructions, that Molina had been charged with one count of assaulting F. and one count of assaulting C. If the trial court did not abuse its discretion in granting the motion to amend, any asserted defects in the initial charging document are moot. *See State v. Johnson*, 198 Ariz. 245, ¶ 4, 8 P.3d 1159, 1161 (App. 2000) (order granting motion to amend charging document reviewed for abuse of discretion). Molina did not oppose the state’s motion to amend the indictment and does not assert on appeal that permitting the amendment was improper. Nor do we find anything in the record suggesting the trial court abused its discretion in granting the state’s motion to amend.

¶ 7 A charge may be amended to correct mistakes of fact or remedy formal or technical defects. *See Ariz. R. Crim. P. 13.5(b)*. “‘A defect may be considered formal or technical when its amendment does not operate to change the nature of the offense charged or to prejudice the defendant in any way.’” *Johnson*, 198 Ariz. 245, ¶ 5, 8 P.3d at 1161, *quoting State v. Bruce*, 125 Ariz. 421, 423, 610 P.2d 55, 57 (1980). The initial indictment

gave Molina adequate notice he would be required to defend against charges that he had assaulted both F. and C. Thus, the amendment did not change the nature of the offenses charged. And we find nothing in the record suggesting the amendment prejudiced Molina.

**Disposition**

¶8 For the reasons stated, we affirm Molina’s convictions and sentences.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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GARYE L. VÁSQUEZ, Judge